

STATEMENT OF TIM LOHNER ON BEHALF OF THE INDIANA  
UTILITY GROUP BEFORE THE WATER POLLUTION CONTROL  
BOARD REGARDING THE AUGUST 26, 2011 DRAFT  
ANTIDEGRADATION RULES

SEPTEMBER 14, 2011

My name is Tim Lohner and I work for American Electric Power, of which, Indiana Michigan Power is a unit. It is my privilege to speak this afternoon on behalf of the Indiana Utility Group with respect to the Draft Antidegradation Standards and Implementation Procedures dated August 26, 2011. The IUG's members include the 14 electric and gas utility members of the Indiana Energy Association as well as Dominion State Line Energy, Indiana Kentucky Electric Corporation, Wabash Valley Power, and Hoosier Energy REC, Inc. The IUG appreciates the opportunity to participate in the development of the rulemaking for Antidegradation Standards and Implementation Procedures in Indiana. It is critical in this time of transition for the electric power industry that IDEM develop antidegradation standards and implementation procedures that are (i) reasonable in balancing protection of water quality and promotion of economic development opportunity, (ii) clear in their meaning and operation, and (iii) not more restrictive than other USEPA Region V states.

The draft of the Antidegradation Standards and Implementation Procedures, as proposed by IDEM on May 9, 2011 and revised in the August 26, 2011 draft reflecting interim recommendations of Board Members Gary Powdrill and David Wagner, contains welcomed clarifications, such as those concerning "threatened and endangered species", "available load capacity," and "used loading capacity." We greatly appreciate the willingness of IDEM and the Board to continue to receive and assess constructive comments to make changes to the draft rule as needed. The IUG accepts that a comprehensive effort to refine the rule at this

stage in the administrative process would be unprecedented, however, the IUG continues to urge additional refinement of the rule as the administrative rulemaking process proceeds. IUG has participated through oral and written comments and again welcomes the opportunity to address the Board. While the IUG does not oppose preliminary adoption of the draft rule, the IUG believes that further improvements to the draft rule must be made during the next phase of the rulemaking to achieve the appropriate legal thresholds required for implementation. The IUG will continue to participate in this review process and highlights a few of our recommended changes as follows.

The IUG again urges clarification of the applicability of the rule to those activities that require a new or modified NPDES permit. The rule as written is so vaguely stated that it could be misunderstood to apply to other Clean Water Act regulatory actions (401 Certifications, unpredictable stormwater flow) that do not lend themselves to this type of implementation process. The agency is urged to speak to this matter, preferably directly in the language of the rule limiting it to NPDES permitting only.

All interested parties understand the framework of the permitting program which is broad in its regulatory authority and specifically defined by the Clean Water Act. It stands to reason that the antidegradation program, a Clean Water Act concept, should follow closely the NPDES permitting program. To the extent that the IDEM and the Board believe that this rule needs to express a broader scope of applicability, then the IUG suggests that clarity might be better served by describing applicability of the antidegradation rule separately with respect to: (i) actions of NPDES dischargers requiring a new or modified NPDES permit and (ii) actions of other persons.

The term "regulated pollutant" continues to leave unanswered the question as to how narrative criteria will be applied. This uncertainty represents a number of legal problems. For the regulated community it means that it will remain exposed to unpredictable and unanticipated regulatory and legal actions which make investment in operations difficult to quantify and therefore difficult to justify. The legal burden of the agency to provide a rule that is not arbitrary nor capricious is a significant one. The IUG suggested that the rule provide that a regulated pollutant be any numerically expressed parameter for which water quality criteria have been adopted. The agency has responded that U.S. EPA and surrounding states have included narrative criteria and therefore so should Indiana. IUG supports such inclusion, but asserts that it is entirely unreasonable for the agency to not qualify the rule such that it will apply only to those narrative criteria for which a numeric value has been developed to represent its expression or implementation. This will allow objective implementation of such criteria in this context, including implementation of the concept of *de minimis* lowering of water quality. This is too important an issue to be left unstated in the draft rule for subsequent treatment only in guidance.

In addition, the rule continues to leave the definition for "toxic substances" vaguely described as substances that "are or may become harmful." Understanding that the agency has the authority to take immediate action to manage imminent threat to human health and the environment, it is unclear why the agency would take the position stated in the response to comments that it must leave the definition vague on the chance that it would not have time to engage in a rulemaking effort to add a toxic substance to the regulatory list. This type of statement in support of not choosing to define a term is unacceptable from a state agency.

The rule must recognize the necessity of a reasonable economic analysis that is cognizant of the regional nature of the economic stability of Indiana. Previously, IUG urged IDEM to further refine the draft rule (at 327 IAC 2-1.3-5(g)(5)) to read, "Where relevant, the anticipated impact on economic and social factors on a local, state and regional basis, as appropriate." This is important to the electric utility industry as power plants located in one locality may benefit those living in a more distant locality.

With respect to the concept of "best available demonstrated control technology" as proposed for use within the draft antidegradation rule, it should be recognized that this concept would be a technology-based effluent limit not covered by 327 IAC 5-5-2 and this concept therefore should be defined separately within 327 IAC 5-5.

While IDEM acknowledged in its response to comments that, "316(a) variances should not be subject to antidegradation review," it still excludes such variances from waters designated as ONRWs. Such variances, which are allowed by section 316(a) of the Clean Water Act, are given by IDEM when a power company can "assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the thermal discharge is made." If 316(a) criteria are fully met, the applicable CWA protections would be achieved, which include protecting the existing uses. The statutory scheme and legislative history indicate that limitations developed under section 316 take precedence over other requirements of the Act and should therefore be exempt from antidegradation review. IUG continues to urge removal from the rule reference to 316(a) as prohibited when as a matter of Clean Water Act law, such variances are not prohibited. In closing, we recognize the efforts to improve this rule and greatly appreciate the work committed to this important rulemaking. Indiana needs to have an antidegradation

implementation program and we support that effort, provided the resulting program is technically correct, legally defensible, and places the state in a leadership role regarding concurrent consideration of economic growth and environmental stewardship.

We are pleased to have the opportunity to raise these issues today so that those attending will be informed of the nature of the revisions the Indiana Utility Group will continue to request in subsequent phases of this rulemaking.



Statement of Lynn Dennis, Director of Government Relations  
Indiana Chapter of The Nature Conservancy

The Nature Conservancy would like to endorse the preliminary adoption of the proposed antidegradation rule currently under consideration by the Water Pollution Control Board. However, we would ask the Board to reinstate the definition of endangered and threatened species (which included both federally and state listed species) as written in the draft presented to the Board in July. We believe it is important and consistent that state listed species be a component of that definition.

In an antidegradation rule the state is attempting to ensure that the quality of our streams is, at the least, maintained and potentially improved. Our state listed species are a component of those systems and the state is responsible for the protection of these species most in need of conservation. Our Chapter has worked across Indiana since 1959 and in the Blue River, an Outstanding State Resource Water located in south central Indiana, for nearly 20 years. During that time we have been a partner with the Department of Natural Resources to protect plants and animals in this important Indiana river. One example of our partnership there has been our work to ensure the continuation of the Eastern Hellbender Salamander, a state listed species, which is rapidly declining across its range and could at some point become a federally listed species.

The rule does provide the commissioner with the ability to deny a proposed lowering of water quality that would jeopardize a state listed species. Including these species in the definition is consistent with that authority and ensures that applicants must also consider these species in their demonstrations. By not including state listed species in the definition, the applicant is not required to mention these species, thus increasing the potential that their existence could go unnoticed by the Department as they consider applications in a timely manner as required.

We thank the members of the Water Pollution Control Board for their service and for providing us this opportunity to express our concerns. We also want to acknowledge the hours that have been spent by both business and industrial entities and conservation and environmental groups in arriving at this point and to thank them for their diligence and commitment to Indiana's freshwater resources.

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Statement of Bowden Quinn, conservation program coordinator, Sierra Club Hoosier Chapter

The Hoosier Chapter of the Sierra Club continues to endorse preliminary adoption of the proposed antidegradation rule. We appreciate the efforts the board has taken to carefully consider the comments made at the first hearing. However, we are concerned about some of the suggested changes to the rule proposed by IDEM and about the decision to continue to allow an exception for mercury from the requirements for bioaccumulative chemicals of concern (BCC) in the Great Lakes basin.

We particularly object to the limitation of the definition of endangered species to those that are federally listed. Since the rule appropriately allows the commissioner to deny a proposed lowering of water quality if it would jeopardize state listed endangered species, the endangered species definition should continue to reference this list so that applicants are required to include information about potential impacts to these species in their antidegradation demonstrations. Leaving the submission of information about state endangered species to the discretion of applicants or the department under section 5(a)(4) presents a risk that the presence of such species in a receiving water body would go unnoticed. It also would make it more difficult for members of the public to obtain this important information. We ask that the board include the Department of Natural Resources' endangered species list in the endangered and threatened species definition.

We are dismayed that the rule continues to treat mercury differently than other bioaccumulative chemicals of concern in discharges to Outstanding State Resource Waters (OSRW) in the Great Lakes basin and Outstanding National Resource Waters. While recognizing the difficulties in detecting and treating mercury, we must not ignore its extreme toxicity and threat to reproductive health. By not including mercury as a BCC, the proposed rule simply shifts the difficulties to IDEM. Two questions that must now be answered are: 1) how will IDEM determine whether a mercury loading to a tributary will impact an OSRW in order to decide whether the loading should be reviewed under the Tier 2 or Tier 2.9 standard? 2) Will IDEM require that proposed water quality improvement projects offered to compensate for a mercury loading to an OSRW be restricted to those that remove a greater amount of mercury from the watershed or will the department attempt to assess the toxicity of other chemical in comparison to mercury to allow a broader range of projects?

Assumedly, these questions will be answered by the guidance document that will accompany the final adoption of the rule. While we agree that such a document should be required at that time to answer the many questions left unresolved by the rule, this leaves IDEM with yet another time-consuming task before this rulemaking can be completed. We worry that this will cause further delay. We also ask for clarification from the board as to what its role will be in the adoption of this guidance. Normally IDEM submits guidance documents to the board for review, but board approval isn't required. If the antidegradation guidance is presented with the rule for final adoption and commenters criticize aspects of the guidance at the hearing, will the board feel empowered to require changes in the guidance before adopting the rule or is that strictly in IDEM's purview? We request that the board and the department offer their opinions on this question before we reach the final adoption stage.

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## COMMENTS ON POLLUTANT TRADING EXEMPTIONS IN THE DRAFT RULE

Submitted by Jeffrey Hyman, Staff Attorney, Conservation Law Center  
Sept. 14, 2011

### I. Report to WPCB August 30, 2011: FILE 14\_DMWGPR report to WPCB 9-14-11

#### b. Pollutant trading

Response / Action: *Exceptions are in the existing Great Lakes antidegradation rule and this is a carry-over from that rule, merely updated to reflect current thinking. . . .*

Report to WPCB August 30, 2011, page 8 (emphasis added).

### II. Comparison of Draft Rule Exemptions With Analogous Existing Rule Exemptions: What are the Changes in Thinking Reflected in the Draft Rule Exemptions?

The Report to the WPCB stated, *"Exceptions are in the existing Great Lakes antidegradation rule and this is a carry-over from that rule, merely updated to reflect current thinking."* I respectfully ask the Board to re-evaluate the accuracy of that statement. The pollutant trading exemptions in the DRAFT rule differ in at least four significant ways compared to the analogous exemptions in the EXISTING antidegradation rules 327 IAC §§ 5-2-11.3 and 11.7.

1. The EXISTING pollutant trading exemptions expressly do not apply to BCCs, whereas the analogous DRAFT exemptions apply to BCCs.
2. The EXISTING exemption that trades a decrease in water quality for a reduction in an air pollutant expressly applies only when "the reduction in the discharge of the air pollutant is necessary to meet a state or federal air quality standard or will substantially reduce human exposure to hazardous air pollutants," whereas the analogous DRAFT exemption applies only when "the reduction in the loading of the air pollutant is necessary to meet a state or federal air quality standard or emission requirement, or will substantially reduce human exposure to hazardous air pollutants *or other air pollutants that are subject to state or federal air quality standards.*" Note that the air pollutants subject to state or federal standards may already meet those standards and thus the benefit of further reducing those pollutants is unclear.
3. The EXISTING pollutant trading exemptions, by using term "the *commissioner may approve,*" expressly allow for the Commissioner's discretion in applying the exemption in any particular case, whereas the analogous DRAFT exemptions remove such discretion and mandate that the exemptions be applied if certain conditions occur.
4. The EXISTING pollutant trading exemptions expressly apply to "waterbodies," whereas the analogous DRAFT exemptions apply to "10-digit watersheds."

I urge the WPCB to consider two questions. First, what "update to thinking" is reflected in the first three changes set forth above, and is that presumed new thinking tied to scientific justification? Second, even though the fourth change from "waterbody" to "watershed" may reflect a landscape approach to solving pollution problems, how can the draft rule assume that trading a water quality decrease in one community and area for a water quality increase in a different community and area entails no social or economic tradeoffs? The expansion from waterbody to watershed may have some benefits but it also requires an antidegradation analysis of social and economic factors.

**COMPARISON OF WATERSHED TRADING EXEMPTIONS IN THE DRAFT  
ANTIDEGRADATION RULE WITH THE EXISTING ANTIDEGRADATION RULES**

*Bolded and italicized text highlights some of the changes to rule language.*

**DRAFT RULE Sec. 5(b)**

An antidegradation demonstration that includes the basic information required under subsection (a) and the necessary information required under subsection (c) shall be submitted for the following beneficial activities that result in a new or increased loading:

\* \* \*

(5) A change in loading of a regulated pollutant:

(A) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources *contributing to the same ten (10) digit watershed*; and

(B) with the result that there is a net decrease in the loading of the regulated pollutant *to the same ten (10) digit watershed*.

**EXISTING RULE 327 IAC 5-2-11.3(b)(1)(C)**

Notwithstanding clauses (A) and (B), the following do not constitute a significant lowering of water quality: \* \* \* (iii) The following actions: . . .

\* \* \*

(DD) New or increased discharges of a pollutant *that is not a BCC*, where there is a contemporaneous enforceable decrease in the actual loading of the pollutant from sources *contributing to the same body of water* such that there is no net increase in the loading of the pollutant *to the same body of water*.

**EXISTING RULE 327 IAC 5-2-11.7(c)(2)**

The commissioner may allow the following proposed new or increased discharges to occur if the applicant demonstrates that the increases are necessary and that they will result in a net environmental improvement:

(A) New or increased discharges of a pollutant or pollutant parameter *that is not a BCC* where there is a contemporaneous enforceable decrease in the actual loading of the pollutant or pollutant parameter from sources *contributing to the OSRW or to the tributaries to the OSRW* such that there is no net increase in the loading of the pollutant or pollutant parameter *to the OSRW*. The *commissioner may approve* such an action only if:

(i) the reduction in the discharge of the pollutant or pollutant parameter exceeds the new or increased discharge of the pollutant or pollutant parameter;

(ii) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken; and

(iii) the new or increased discharge complies with subdivision (4).

**DRAFT RULE Sec. 5(d)**

An antidegradation demonstration that includes the basic information required under subsection (a), the necessary information required under subsection (c), and the alternatives analysis information required under subsection (e) shall be submitted for the following beneficial activities that result in a new or increased loading:

- (1) A new or increased loading of a regulated pollutant where the following are true:
    - (A) The new or increased loading is necessary to accomplish a reduction in the loading of another regulated pollutant.
    - (B) There will be an improvement in water quality in the receiving water or waters. An *improvement in water quality will occur if the impact* from the new or increased loading of the regulated pollutant is:
      - (i) less bioaccumulative; and
      - (ii) less toxic than the reduced pollutant or pollutant parameter.
- In making these determinations regarding bioaccumulation, the BAF methodology under 327 IAC 2-1.5-13 will be used.

**EXISTING RULE 327 IAC 5-2-11.3(b)(1)(C)**

Notwithstanding clauses (A) and (B), the following do not constitute a significant lowering of water quality: \* \* \* (iii) The following actions: . . .  
\* \* \*

- (JJ) An action that will result in a new or increased discharge of a pollutant or pollutant parameter *that is not a BCC*, if the new or increased discharge is necessary to accomplish a reduction in the discharge of another pollutant or pollutant parameter and the commissioner determines the action will result in a net improvement in water quality in the waterbody. The *commissioner may approve* such an action only if:
- (aa) *the reduction in the discharge of the reduced pollutant exceeds the increase in the discharge of the new or increased pollutant;*
  - (bb) the new or increased pollutant is determined to be significantly less bioaccumulative and toxic than the decreased pollutant; and
  - (cc) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken.

**EXISTING RULE 327 IAC 5-2-11.7(c)(2)**

The commissioner may allow the following proposed new or increased discharges to occur if the applicant demonstrates that the increases are necessary and that they will result in a net environmental improvement:  
\* \* \*

- (B) An action that will result in a new or increased discharge of a pollutant or pollutant parameter *that is not a BCC* if the new or increased discharge is necessary to accomplish a reduction in the discharge of another pollutant or pollutant parameter. The *commissioner may approve* such an action only if:
- (i) the new or increased discharge of the pollutant or pollutant parameter is determined to be either:
    - (AA) less toxic and no more bioaccumulative; or
    - (BB) less bioaccumulative and no more toxic;
  - (ii) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken; and
  - (iii) the new or increased discharge complies with subdivision (4).

**DRAFT RULE Sec. 5(d)**

An antidegradation demonstration that includes the basic information required under subsection (a), the necessary information required under subsection (c), and the alternatives analysis information required under subsection (e) shall be submitted for the following beneficial activities that result in a new or increased loading:

\* \* \*

- (2) A new or increased loading of a regulated pollutant where:
- (A) the new or increased loading is necessary to accomplish a reduction in the release of one or more air pollutants; and
  - (B) there will be an environmental improvement *that will occur* when the applicant demonstrates that the reduction in the loading of the air pollutant:
    - (i) is necessary to meet a state or federal air quality standard or emission requirement; *or*
    - (ii) will substantially reduce human exposure to hazardous air pollutants *or other air pollutants that are subject to state or federal air quality standards*.

**EXISTING RULE 327 IAC 5-2-11.3(b)(1)(C)**

Notwithstanding clauses (A) and (B), the following do not constitute a significant lowering of water quality: \* \* \* (iii) The following actions: . . .

\* \* \*

(KK) An action that will result in a new or increased discharge of a pollutant or pollutant parameter *that is not a BCC*, if the new or increased discharge is necessary to accomplish a reduction in the release of an air pollutant and the commissioner determines the action will result in a net environmental improvement. The *commissioner may approve* such an action only if:

- (aa) the reduction in the discharge of the air pollutant is necessary to meet a state or federal air quality standard or will substantially reduce human exposure to hazardous air pollutants;
- (bb) *the reduction in the mass of air pollutant discharged represents a substantial reduction in the total mass released by the applicant*; and
- (cc) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge to the waterbody have been taken.

**EXISTING RULE 327 IAC 5-2-11.7(c)(2)**

The commissioner may allow the following proposed new or increased discharges to occur if the applicant demonstrates that the increases are necessary and that they will result in a net environmental improvement.

\* \* \*

(C) An action that will result in a new or increased discharge of a pollutant or pollutant parameter *that is not a BCC* if the new or increased discharge is necessary to accomplish a reduction in the release of an air pollutant. The *commissioner may approve* such an action only if:

- (i) the reduction in the discharge of the air pollutant is necessary to meet a state or federal air quality standard or will substantially reduce human exposure to hazardous air pollutants;
- (ii) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken; and
- (iii) the new or increased discharge complies with subdivision (4).